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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

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state commerce and no less intimate relation to it than such ordinary and incidental activities as might be performed by a maintenance man or a ticket taker employed on the Waterway. Cf. *Overstreet* case, *supra*.

The project, moreover, is peculiarly "national" in its character. The development of navigable waters is an historic function of the Federal Government and Congress's "power over improvements for navigation in rivers is 'absolute.'" *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 405. The project not only serves the needs of interstate commerce; that, indeed, is its exclusive purpose.

The situation is not comparable to the construction of a factory building which, upon completion, may never be dedicated to commerce or used in the production of goods for commerce. A project such as that in the instant case is distinctively related to commerce "from the beginning of construction [by reason of] locality and design." Justice Hughes, speaking for a unanimous court in *The Raithmoor*, 241 U. S. 166, 176–177, a libel in admiralty involving the status of a new structure which, when completed was to be used solely as a beacon on the edge of a navigable channel.[2]

[2] In *Murphey* v. *Reed*, 335 U. S. 865, a Fair Labor Standards case in which this Court ordered the dismissal of "those causes of action involving solely construction work," the construction was not for the purpose of improving an existing instrumentality of commerce. Part of the war effort, it had to do with the building of a Navy camp for training

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OPINIONS BELOW

The opinion of the district court (R. 53–57) is reported at 113 F. Supp. 235. The *per curiam* opinion of the Court of Appeals (R. 64) is reported at 214 F. 2d 132.

JURISDICTION

The judgment of the Court of Appeals (R. 64–65) was entered on June 30, 1954. The petition for a writ of certiorari was filed on October 5, 1954, and was granted on November 22, 1954 (R. 65). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

The determination whether a particular activity is so substantially and intimately related to commerce as to be deemed a part of it is, of course, one to be made on the facts of each case and in terms of the practical realities. We do not suggest that in making this determination a court should ignore any of the physical facts which bear upon the relationship of the employment activity to commerce. On the contrary, it is to consider all of the factors which illuminate and define the character of that relationship. Our objection to the decision below is that the court was apparently of the view that the single fact that construction is new construction, rather than maintenance and repair, is dispositive of the question of coverage. There is, we submit, no such mechanical test. It is not enough to say whether the work is for

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"Seabees" and a Naval Advance Base Depot which, upon completion, was to be used for the storage, assembly, and reshipment of materials and equipment. See *Reed* v. *Murphey*, 168 F. 2d 257, 259–260 (C. A. 5). Cf. *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334 (C. A. 10), certiorari denied, 345 U. S. 915, in which the court of appeals, considering the *Reed* case and others like it, stated that the construction of a waterway improvement project "is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. Such a building by its mere construction is no part of commerce and has without more no active connection or relation thereto. It does not follow from the mere construction of such a building that it ever will have connection with commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable." 198 F. 2d at 336.

STATUTE INVOLVED

This case arises under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U. S. C. 201 *et seq.*, the pertinent provisions of which are:

> Definitions:
>
> SEC. 3 [63 Stat. 911]. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> Maximum Hours:
>
> SEC. 7 [63 Stat. 912]. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> * * * * *
>
> Investigations, Inspections, Records * * *
>
> SEC. 11 [52 Stat. 1066]. * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act

> shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

QUESTION PRESENTED

Respondent's employees have been engaged in construction work on the Algiers Lock and Canal, a project authorized by Congress under its power to regulate commerce. The project is designed as an improvement to, and an integral part of, the Gulf Intracoastal Waterway, an existing interstate waterway. It has been undertaken in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway."

The question presented is whether these employees are "engaged in commerce" within the meaning of the Fair Labor Standards Act, or whether work on such projects is excluded from the "commerce" coverage of this Act by reason of the "new construction" doctrine derived from early decisions under the Federal Employers' Liability Act.

STATEMENT

The Secretary of Labor brought this action pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime and record-keeping requirements of that Act. The employees in question were employed in the performance of a half-a-million dollar contract awarded to respondent by the United States Corps of Engineers in connection with the construction of the Algiers Lock and Canal project in Orleans Parish, Louisiana.

The Algiers Lock and Canal is to form an integral part of an existing project known as the Gulf Intracoastal Waterway. It is designed to improve and make a faster, safer, and more dependable passage into, out of, and across the Mississippi River at New Orleans than is provided by the present Harvey Lock and Canal alone (district court opinion, R. 53–54). It was recommended by the Corps of Engineers (Sen. Doc. No. 188, 78th Cong., 2d. Sess.), and authorized by Congress under its power to regulate commerce (Rivers and Harbors Act of 1945, c. 19, 59 Stat. 10, 18) in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway" (Sen. Doc. *supra,* at p. 5).

The Gulf Intercoastal Waterway extends from Apalachee, Florida, to the Mexican border and is an instrumentality of commerce (district court opinion, R. 53). Along the Gulf of Mexico the

doctrine) which characterized the early interpretations of that Act. For example, the statute was narrowly construed as not applying to back-shop employees engaged in making repairs on locomotives and cars. *Bezue* case, *supra.* However, subsequently, under another statute (the Railway Labor Act), these back-shop activities were held to "have such a relation to the other confessedly interstate activities * * * that they are to be regarded as a part of them," *Virginian Railway* v. *System Federation,* 300 U. S. 515, 556.[4]

The Fair Labor Standards Act was adopted after a broader concept of "commerce" had emerged. Thus, in considering the scope of the "commerce" power, the legislators specifically referred to the holding in the *Virginian Railway* case, which had recently been decided by this Court.[5] And in marked contrast to the Employers' Liability Act, which was limited to railroads, the Fair Labor Standards Act was designed for broad national purposes reaching into all indus-

[4] We do not, of course, refer to the *Virginian Railway* case to suggest that the standards of coverage under the Railway Labor Act and the Fair Labor Standards Act are identical, but in order to indicate the evolution of the "commerce" concept in the years following the early Employers Liability Act cases.

[5] Senator (now Mr. Justice) Minton, in the course of a colloquy with Senators Borah and Bailey on the intended scope of the Act's coverage, explicitly pointed out that the Supreme Court had held back-shop employees "to be in commerce." 83 Cong. Rec. 9172.

waterway crosses the Mississippi River at New Orleans. The main route of the waterway at this point now enters the Mississippi from the east through the Industrial Canal, extends upstream 5.5 miles through the harbor of New Orleans, and then leaves the river from the west through the Harvey Lock and Canal (Sen. Doc. *supra,* at p. 3).

New Orleans is a major port for seagoing commerce and the main transshipment terminal for intracoastal barge traffic (Sen. Doc., *supra,* at p. 3). In the 5.5 mile stretch of the waterway through this port intracoastal traffic has to compete with seagoing commerce for room to navigate (district court opinion, R. 53). Moreover, intracoastal traffic itself "has greatly exceeded original expectations" (Sen. Doc. *supra,* at p. 3) and Harvey Lock and Canal, built in 1934 (R. 41), is, as the district court found, "proving inadequate alone to handle" it (R. 53). Since it is not practical to widen the Harvey Lock and Canal because it is located in a highly developed industrial section of the City of New Orleans (Sen. Doc. *supra,* at p. 12; R. 40), Algiers Lock and Canal is being constructed to provide an alternate connection with the Mississippi at a point 4.7 miles downstream from the Industrial Canal (Sen. Doc., *supra,* at p. 4).

The Algiers Lock and Canal will not only eliminate the delays now encountered by intracoastal traffic using the congested Harvey Lock, but it

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tries engaged in interstate commerce. Its objective was not simply "to regulate interstate commerce as such," but "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *Powell* v. *U. S. Cartridge Co., supra,* 339 U. S. at 510. Its "scope was stated in terms of substantial universality" because "[b]readth of coverage was vital to its mission." *Id.,* p. 516.

The rigid doctrine of early Liability Act cases—specifically, the doctrine that new construction of railroad facilities lies outside the realm of "commerce," *Raymond* v. *Chicago, M. & St. P. Ry., supra*—not only need not be carried over into the Fair Labor Standards Act; the decisions of this Court, discussed *supra,* pp. 14–15, affirmatively show that the test of coverage under the latter statute is a different and a "practical" one. That the "new construction" formula has no vitality, at least for purposes of the Fair Labor Standards Act, is further indicated by this Court's decisions, last term, in *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, and *Thomas* v. *Hempt Bros.,* 345 U. S. 19. The holdings there—that employees engaged in off-the-road manufacture of road materials to be used primarily on interstate roads and railroads were producing goods for commerce—made no effort to distinguish between an end-use in repair and maintenance work and utilization in new road construction. Thus, the opinion in the *Hempt* case (345 U. S. at 20) re-

will provide safer passage across the Mississippi. As the district court recognized, Algiers Point is "very dangerous and hazardous * * * and * * * has been the scene of many, many serious marine casualties" (R. 44). The Algiers Lock and Canal will avoid treacherous Algiers Point and the crowded port of New Orleans (district court opinion, R. 54). Also, this alternate connection with the Mississippi will assure the dependability of the Intracoastal Waterway. As pointed out in the Senate Document covering this project, there is no closed navigation season on the lower Mississippi and the intracoastal waterway during which general overhaul and major repairs to locks may be accomplished without stopping traffic (Sen. Doc., *supra,* at pp. 11–12, 13). Any accident or mishap necessitating the closure of Harvey Lock would interrupt the heavy volume of waterborne commerce using it since only a minor portion of this traffic could be diverted through the smaller alternate west bank connection at Plaquemine, 110 miles upstream from Harvey Lock (*id.* pp. 3, 11–12).

As described in the pertinent Senate Document, the Algiers Lock and Canal project involves the construction of a channel 12 feet deep and 125 feet wide, extending from the right bank of the Mississippi River, at a point 4.7 miles below the Industrial Canal, southwesterly a distance of 9 miles to the Intracoastal Waterway about six miles south

lied in part upon allegations in the complaint that the materials were being produced for "laying and building" the Pennsylvania Turnpike and "to build and erect landing fields" at an airport, as well as for maintenance and repair of road beds. It was the relationship of the employee activities to interstate instrumentalities of commerce which was, without more, controlling. Here that relationship is not less but more direct and immediate. This is not a case of manufacture of materials essential to repair or improvement of an instrumentality of commerce; it involves the improvement of the interstate instrumentality itself.

C. While this Court has not passed upon the application of the Fair Labor Standards Act to persons engaged in the improvement of navigation, the courts of appeals (including the court below) have repeatedly held that employees working on waterway improvement projects certainly no more vital to interstate commerce than the Algiers Lock and Canal are entitled to the protection of the statute. See *Tobin* v. *Pennington-Winter Construction Company*, 198 F. 2d 334 (C. A. 10), certiorari denied, 345 U. S. 915 (construction of a multiple-purpose dam); *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. 2d 945 (C. A. 6) (construction of new dikes and revetments on the Mississippi River); *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334

of Harvey Lock; a lock at the river end, 75 feet wide, 760 feet long and 13 feet deep, with an emergency storage dam; widened forebays at the lock; drainage canals east of the waterway to intercept existing drainage facilities; two pumping plants, two movable highway bridges and a movable railroad bridge across the waterway; a road relocation requiring two fixed bridges over existing canals, and other minor adjustments in local improvements.

Respondent's contract was for the "Earthwork and Emergency Dam Storage," described by its president as "build[ing] guide levees on the Mississippi River on the east end, and backfill[ing] the lock" (R. 51; district court opinion, R. 53). At the time this work was undertaken by respondent, only the concrete work on the locks had been completed (R. 51). The project was still incomplete at the time of trial. Among other things, the earthwork levee which respondent built from the lock structure to the Mississippi levees in Algiers had not been tied in with those levees (R. 49). The canal itself had not been completely dredged (R. 49). Guide levees to the canal still had to be completed and the Mississippi River levees brought up to grade (R. 48–49). Of course, until the project is completed, it cannot be used as a part of the Gulf Intracoastal Waterway (R. 49). But work on the project is continuing and its completion is anticipated (R. 50).

Although the trial court found that the primary purpose of Algiers Lock and Canal is to relieve "the congestion which now obtains in Harvey Lock and Canal [and, in addition] * * * eliminate the necessity of Gulf Intracoastal Waterway traffic navigating the 5.5 miles of the Mississippi River through the crowded harbor of New Orleans and around treacherous Algiers Point" (R. 54), it held that the work falls within the "new construction" doctrine of the early decisions under the Federal Employers' Liability Act, rather than the principles of *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, and *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740, 324 U.S. 720, and that respondent's employees could not, therefore, be said to be "engaged in commerce" within the meaning of the Fair Labor Standards Act. The Court of Appeals affirmed in a short *per curiam* opinion (R. 64), which simply expressed agreement with the district judge's opinion, and cited two of its own recent decisions: *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (involving work on a highway construction project) and *Billeaudeau* v. *Temple Associates, Inc.*, 213 F. 2d 707 (involving work in connection with construction of a housing project).

SUMMARY OF ARGUMENT

The decisions below recognize that the Gulf Intracoastal Waterway is an existing instrumentality of national commerce and that the building

(C. A. 9) (dredging of a new channel and construction of a new pier with retaining walls at Bremerton Harbor); *Tobin* v. *Ramey,* 205 F. 2d 606 (C. A. 5), rehearing denied, 206 F. 2d 505, certiorari denied *sub nom. Hughes Const. Co.* v. *Secretary of Labor,* 346 U. S. 925 (enlargement of a set-back levee, which, though a segment of the Mississippi levee system, was three to six miles from the river's banks). See also *Cuascut* v. *Standard Dredging Corp.,* 94 F. Supp. 197 (D. Puerto Rico) (improvement of San Juan Bay by various dredging jobs).[6]

The *Pennington-Winter* case is particularly close to the case at bar. The work which was held covered there involved the clearing of a reservoir site for a proposed multiple-purpose dam, designed as part of a comprehensive plan for the improvement of the Arkansas and Mississippi Rivers. There, as here, the project had been authorized by Congress under its power to regulate commerce. As in the instant case, the work was not physically in the river bed or waterways to be improved, and the improvement to navigation

[6] Excluding the case under review, the only other waterway improvement case in which a contrary result was reached is *Nieves* v. *Standard Dredging Corporation,* 152 F. 2d 719 (C. A. 1). That case is distinguishable on the ground that it involved work outside the continental United States on the shores of Puerca Bay, Puerto Rico, described in the decision as a "swampy wilderness" which "had never been used in interstate commerce" (152 F. 2d at 721). See in this connection *Cuascut* v. *Standard Dredging Corp., supra,* 94 F. Supp. at 203.

of the Algiers Lock and Canal (the employment activity here involved) will result in an improvement to the Waterway which is vitally and immediately related to its safe and efficient functioning. The district court and the court of appeals were of the view, however, that since the construction was "new construction," rather than maintenance and repair, they were obliged to hold that it was not yet in commerce and hence not subject to the Fair Labor Standards Act.

A. The test of coverage, as enunciated in this Court's decisions, is a "practical" one—whether the work being performed is so "vital to the proper functioning of [existing] instrumentalities of commerce" that it is in substance a part of commerce itself. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 130. This requires a realistic appraisal of the particular transactions and operations involved (see *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567), for purposes of determining the actual integral relationship of the employees' work to interstate commerce. Neither the fact that the employment is in "new construction," rather than in maintenance and repair, nor the fact that the improvement project lies outside the present physical confines of the existing instrumentality of commerce, is dispositive. See *Fitzgerald Co.* v. *Pedersen*, 324 U. S. 720; *Tobin* v. *Pennington-Winter Construction Company*, 198 F. 2d 334 (C. A. 10), certiorari denied, 345 U. S. 915.

It is evident that relief of the congested and dangerous conditions at New Orleans harbor by addition of the new lock and canal will have far more substantial impact on interstate commerce and no less intimate relation to it than such ordinary and incidental activities as might be performed by a maintenance man or a ticket taker employed on the Waterway. Cf. *Overstreet* case, *supra.* It is equally plain that the project is peculiarly "national" in character (cf. *Kirschbaum* v. *Walling,* 316 U. S. 517, 520 *et seq.*); improvement of the navigable waterway is within the exclusive control of Congress and represents an historic function of the federal government. The situation is not comparable to the construction of a factory building which, upon completion, may or may not be dedicated to the production of goods for commerce. Here, the project is of such a nature that it is distinctively related to commerce "from the beginning of construction [by reason of] locality and design," *The Raithmoor,* 241 U. S. 166, 176–177.

B. The courts below erred in applying mechanically the so-called "new construction" doctrine derived from early cases arising under the Federal Employers' Liability Act. "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce," *McLeod* v. *Threlkeld,* 319 U. S. 491, 495. That doctrine, moreover, was developed when it was the prevailing view that the power

of Congress to regulate the incidents of employment was limited to persons strictly engaged in transportation. The Fair Labor Standards Act was adopted after a broader concept of the commerce power had emerged. Its objective was "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *Powell* v. *U. S. Cartridge Co.,* 339 U. S. 497, 510, and, accordingly, its "scope was stated in terms of substantial universality." *Id.,* p. 516.

That the "new construction" doctrine has no vitality, at least for purposes of the Fair Labor Standards Act, is not only indicated by this Court's decisions, cited *supra,* which declare a different and "practical" test; it is also confirmed by the Court's recent holdings in *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, and *Thomas* v. *Hempt Bros.,* 345 U. S. 19, which found that employees engaged in the manufacture of road materials were producing goods for commerce. These two cases draw no distinction between an end-use in maintenance and repair of existing interstate highways and utilization in new road construction. The relationship to the existing instrumentalities of interstate commerce was, without more, deemed controlling. In the case at bar, the relationship is not less but more direct and immediate.

C. Examination of cases which have reached the various courts of appeals shows a virtually uniform course of decision treating waterway

improvement projects as within the scope of the statute. In related fields, where the existing instrumentality is not a waterway and where its interstate character may be less patent, cases involving employees engaged in improvement projects have produced varying results. But leading decisions in these fields nonetheless lend further support to the conclusion that, by any practical and realistic test, the employees whose rights are at stake in this proceeding must be held entitled to the protection of the Act.

ARGUMENT

EMPLOYEES ENGAGED IN CONSTRUCTION OF A LOCK AND CANAL VITAL TO THE PROPER FUNCTIONING OF A NATIONAL WATERWAY ARE "ENGAGED IN COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT. IT IS NOT CONTROLLING THAT THE CONSTRUCTION IS "NEW" AND THAT IT LIES OUTSIDE THE BED OF THE EXISTING WATERWAY

There can be no dispute that the construction project involved in this case—the building of the Algiers Lock and Canal—is an improvement essential to the safe and efficient functioning of the existing Gulf Intracoastal Waterway. As the trial court found and as the pertinent engineering report shows, the Waterway's present west bank connection with the Mississippi at New Orleans, which is twenty years old, is inadequate and dangerous, and cannot be subjected to a major repair job without serious interruption of commerce. The new lock and canal will materially

aid commerce by eliminating the hazards and delays encountered by intracoastal traffic in navigating the crowded harbor at New Orleans and treacherous Algiers Point. See Statement, *supra*, pp. 4–6.

The courts below, however, were of the view that the "extremely narrow" question "presented here for adjudication" was whether the building of the Algiers lock and canal "amount[s] to maintenance and repair * * * or is * * * new construction * * *" (R. 54–55). Concluding that the project fell in the latter category, and resting on the "new construction" doctrine derived from cases decided over thirty-seven years ago under the old Federal Employers' Liability Act, they held in substance that the workmen were not engaged in commerce because the project which they were building, being incomplete, was not yet integrated with the existing instrumentality of commerce. The district court's opinion (in which the court of appeals concurred) also seeks to distinguish various cases which involved the new construction of improvements, rather than maintenance and repair work, on the ground that in those cases the improvement was located within the physical framework of the existing instrumentality of commerce (R. 55).

We shall urge that this approach misconceives the correct test, as enunciated by this Court, and that it mistakenly follows artificial rules which are neither binding under the Fair Labor Stand-

ards Act nor consonant with that statute's declared purposes. We shall point out further that, in comparable and related situations, various courts of appeals have applied the "practical" test which we think is required by this Court's decisions, and that the results reached in those cases are inconsistent in principle with the ~~test which we think is required by this Court's~~ decision below.

A. In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567, and again in *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128, this Court stated: "'It is clear that the purpose of the [Fair Labor Standards] Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce.' And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations." The Court accordingly held, in *Overstreet,* that the employees there involved (a ticket-taker, a draw-bridge operator, and a repair man employed by the owner of a private toll road and drawbridge) were "engaged in commerce" because their work was "vital to the proper functioning" of instrumentalities of commerce (p. 130). "The work of each petitioner in providing a means of interstate transportation and communication is so intimately related to interstate commerce," the Court declared, "'as to be in practice and in legal contemplation a part of it'" (*ibid.*). And see *Fitzgerald Co.* v. *Pedersen,* 324 U. S. 720, 724, in which the Court applied these principles

to employee activities relating to the repair of the substructures of two railroad bridges and to the building of "entirely new abutments" under two other such bridges.[1]

In similar vein, this Court has repeatedly admonished that there is no mechanical test or "touchstone" and that the broad statutory objectives should not be frustrated by "too narrow a construction." See *Kirschbaum* v. *Walling*, 316 U. S. 517, 520-521; *Walling* v. *Jacksonville Paper Co.*, *supra*, 317 U. S. at 567; *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 516–517. The courts are to be guided by such "practical considerations" as the actual integral relationship of the employees' work to the interstate commerce, and the "national" as distinguished from the "purely local" character of the work. *Kirschbaum* v. *Walling*, *supra*, 316 U. S. at 521 *et seq.*; *Overstreet*, *supra*, 318 U. S. at 128. "[T]he policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.'" *Overstreet*, at 128.

As a practical matter, it is evident that the improvement of the Gulf Intracoastal Waterway by the construction of a new lock and canal relieving congestion at the New Orleans harbor will have far more substantial impact on inter-

[1] In *Pedersen*, an argument based upon "new construction" was pressed by the employer. See No. 396, October Term, 1942, Br. in Op., pp. 5, 10.

maintenance or improvement; whether it involves construction or reconstruction; whether it aims at a mere enlargement or a distinct addition; whether the project lies within the physical confines of the existing instrumentality as it is now constituted or outside of it. The test, as indicated above, is whether the work is so directly and vitally concerned with the functioning of an instrumentality of interstate commerce as to be, practically speaking, a part of that commerce rather than a "purely local" activity. And if that is so, the employees of this lock and canal project, who are directly engaged in constructing essential improvements to an existing national artery of commerce, must be deemed fully within the protection of the statute.

B. In applying the doctrine of early Federal Employers' Liability Act cases to the issue of coverage under the Fair Labor Standards Act, the decision below appears to have ignored this Court's statement in *Overstreet* that the two Acts, though similar in some respect, "are not strictly analogous" (318 U. S. at 131), and its caution in *McLeod* v. *Threlkeld*, 319 U. S. 491, 495: "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce * * *. The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is

not to be repeated in the administration and operation of the Fair Labor Standards Act."[3]

The earlier statute was, of course, restricted to the interstate transportation operations of railroads. Indeed, it was then the prevailing view that the power of Congress to regulate the incidents of employment was confined to employees strictly engaged in "transportation" (see *Employers' Liability Cases,* 207 U. S. 463; *Raymond* v. *Chicago, M. & St. P. Ry.,* 243 U. S. 43; *New York, N. H. & H. R. Co.* v. *Bezue,* 284 U. S. 415)—a view which produced many of the over-refinements (including the "new construction"

[3] A number of cases have similarly relied upon doctrine derived from Federal Employers' Liability Act cases in considering the application of the Fair Labor Standards Act to the new construction of roads to be connected with an interstate highway system. *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (C. A. 5); *Koepfle* v. *Garavaglia*, 200 F. 2d 191 (C. A. 6); *Moss* v. *Gillioz Construction Co.*, 206 F. 2d 819 (C. A. 10). But see *Walling* v. *McCrady Construction Co.*, 165 F. 2d 932 (C. A. 3), certiorari denied, 329 U. S. 785; *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4). As pointed out in the petition for certiorari, the instant case is accordingly significant not only from the standpoint of employees engaged in the improvement of navigable streams and waterways but also from the standpoint of many employees engaged in road-building. This is not to say, of course, that all road construction cases fall readily in the same basket as the instant case. In contrast to the situation here, in which the only purpose served by the construction is improvement of an exclusively national artery of commerce, road construction serving the needs of interstate travel ordinarily benefits local traffic as well. In the latter class of cases, there may frequently be a factual issue as to the substantiality of the interstate aspects.

awaited completion of the project.[7] The trial court had held that "new construction of an instrumentality of interstate commerce is not covered by the Fair Labor Standards Act" (see 10 WH cases 506; 20 Labor Cases Para. 66705 (E. D. Okla., 1951) (not otherwise reported)). But the Tenth Circuit, pointing to the fact that the proposed dam was part of a developmental plan, reversed on the ground that the construction, though "new," was plainly "an improvement of an existing project for the control of floods and the betterment of navigation" (198 F. 2d at 336).[8]

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[7] The dam and reservoir project in *Pennington-Winter* was certainly no more immediately related to commerce than the Algiers Lock and Canal project. The dam was to be located on a non-navigable tributary of the Arkansas River some thirteen miles upstream from the confluence of the rivers whose navigability was to be improved by the dam, and its beneficial effect upon navigability depended largely upon the construction of a number of other similar tributary projects proposed in a comprehensive plan to be carried out over a period of years. Here, the lock and canal is to be physically connected, at both ends, with the existing Gulf Intracoastal Waterway and is to be an integrated link in the navigable waterway itself. Moreover, in *Pennington-Winter* the dam was designed to serve various purposes (electric power, flood control, recreation) in addition to improving the navigability of the affected waters. Here, the sole function of the project is improvement of an existing artery of commerce.

[8] The court further observed (see note 2, p. 17, *supra*) that the situation had nothing in common with the construction of a new building which, upon completion, might or might not be dedicated to the production of goods for commerce.

In *Patton-Tulley, supra,* the trial court had similarly denied coverage on the ground that the "construction of a facility not yet employed in interstate commerce was not engagement in such commerce" (134 F. 2d at 947). But, since the new dikes and revetments were designed to aid navigation on the Mississippi, the Sixth Circuit reversed, stating (*ibid.*): "The short answer is that the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory * * *."

In the *Puget Sound* case, *supra,* the Ninth Circuit emphasized that "the facility worked on need not be employed in commerce during its construction" (156 F. 2d at 336). The facts held to provide a basis for coverage there were that the new channels would improve Bremerton Harbor by extending its previously navigable portion, and that the new pier and retaining walls were "an addition to other such facilities of the Navy Yard" on Puget Sound (p. 335).

In *Tobin* v. *Ramey, supra,* the job was to enlarge a set-back levee for the Mississippi—work which the trial court had found "would have only a remote influence on the channel of navigation" (*Tobin* v. *Ramey,* 106 F. Supp. 349, 352 (W. D. La.)). In holding the Act applicable, the Fifth Circuit stressed the fact that the levee was a segment of the levee system for the main channel of the Mississippi and that it was constructed and later expanded pursuant to a comprehensive plan

for the development of the entire river (205 F. 2d at 607).[8]

Realistically viewed, it is plain that the work here is no less "intimately related to interstate commerce" and no less "a part of it" (*Overstreet, supra,* 318 U. S. at 128, 130) than the activities held covered in the above cases. Like the new multiple-purpose dam in *Pennington-Winter,* the new dikes and revetments in *Patton-Tulley,* the new channels and pier in *Puget Sound,* and the set-back levee in *Ramey,* the lock and canal here is designed to improve an existing navigable waterway. This being so, the fact that new construction is involved and that it will not be used until completed should not preclude application of the Act here any more than it did in those situations.

Cases presenting similar issues but involving improvement projects unrelated to waterways have produced varying results. See note 3, p. 19, *supra.* This may well be explained, at least in large part, by the fact that while navigation improvement is readily seen as an activity palpably "national" in character, the improvement, by new construction, of other types of facilities is apt to present a picture in which the interstate aspects are less sharply defined. Nonetheless, the courts of appeals, guided by practical considera-

[8] In other contexts, this Court has emphasized the need to view waterway projects as a whole and not as isolated segments. *United States* v. *Appalachian Power Co.,* 311 U. S. 377; *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508.

tions, have frequently held that improvement of other types of instrumentalities of commerce is so directly and vitally related to commerce as to be deemed a part of it. See, *e. g., Bennett* v. *V. P. Loftis Co.,* 167 F. 2d 286 (C. A. 4) (highway improvement project involving the construction of a new bridge and new connecting roads); *Walling* v. *McCrady Construction Co.,* 156 F. 2d 932 (C. A. 3), certiorari denied, 329 U. S. 785 (various projects including, among others, extension of a telephone system by laying a new conduit, erection of "new bridges in different locations from the old with new approaches to one of them," and construction of "foundations for a new signal tower" (156 F. 2d at 933-934)); *Mitchell* v. *Chambers Construction Co.,* 214 F. 2d 515 (C. A. 10) (construction of a new reservoir and chlorinator house to augment an existing municipal water system). See, also, comment, 60 Harv. L. Rev. 154.

In the *Loftis* case, *supra,* where coverage was resisted on the ground that the bridge "was a new structure, and no traffic passed over it during the period of its construction" (167 F. 2d at 287), the Fourth Circuit succinctly stated (p. 288): "If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564 * * *."

Similarly, in the *McCrady* case, *supra*, the Third Circuit rejected the contractor's argument that those projects involving new construction would not constitute commerce until actually put into use. It saw "no force in these ingenious distinctions," pointing out that "new abutments to the bridges in the *Pedersen* case [*Pedersen* v. *Fitzgerald Co.*, 318 U. S. 740, 324 U. S. 720] construed as being under the Act were of the type of so-called 'new construction' the appellant performed carrying out its contracts" (156 F. 2d at 936). With particular reference to the conduit and signal tower jobs, the court observed that "while not reconstruction jobs [they] were so closely allied, the first to the existing telephone system and the second to the railroad as to come well within the *Pedersen* rule" (*ibid.*).

The *Chambers Construction Co.* case involved the construction, at a new location, of a new reservoir and chlorinator house which, upon completion, were to be connected by pipeline with an existing municipal water system. The system served, *inter alia*, customers engaged in commerce and producing goods for commerce. The court of appeals, though it sustained on other grounds the district court's failure to grant an injunction against the employer, indicated its view that the construction, being designed to augment the existing water system, bore a sufficiently direct and integral relation to commerce to come within the statute. See 214 F. 2d at 517.

CONCLUSION

The recognized purposes and objectives of the Fair Labor Standards Act, the decisions of this Court enunciating the applicable criteria of coverage, and leading decisions of the courts of appeals applying these criteria, alike support the conclusion that the employees whose rights are at stake in this proceeding are entitled to the protection of the statute. Unquestionably, they have been engaged in an improvement project which is vitally and immediately related to the safe and efficient functioning of an existing artery of national commerce. No more can be required to demonstrate that employees are "engaged in commerce" within the meaning of the Act. The judgment of the court of appeals should be reversed and the case remanded to the district court for entry of an appropriate decree.

Respectfully submitted.

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